Filed 08/4/09 Marriage of Durand and Latedjou-Durand CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of HUGUES DURAND and ELISE LATEDJOU-DURAND.	
HUGUES DURAND, Appellant, v. ELISE LATEDJOU, Respondent.	A122015 (Super. Ct. for the City and County of San Francisco No. FDI-02-751989)

Hugues Durand (Durand) and Elise Latedjou-Durand (Latedjou) married in 1991, and Latedjou gave birth to their daughter in 1992. Durand moved out of their home in San Francisco in September 2000, and it appears that he initiated proceedings for the dissolution of their marriage in October 2002. Following a trial conducted in November 2007, the trial court filed a final statement of decision on April 10, 2008, in which it ruled on several contested issues regarding division of the community estate. Durand's appeal raises a number of objections to the statement of decision. As discussed below, we conclude there was no prejudicial error and affirm.

BACKGROUND

At some point during their marriage, Durand and Latedjou agreed that Latedjou would go back to college to obtain her degree, and she enrolled at San Francisco State

University.[1] While enrolled, Latedjou obtained student loans in the amount of $20,881. The loan proceeds were not used for educational purposes but were deposited into their joint bank account and used for community living expenses.

Durand and Latedjou purchased a home in San Francisco (the subject property) in February 2000, for $344,000. To complete this purchase they made a down payment of $44,810.90, drawn from their joint financial accounts. In addition they borrowed $275,200 from Washington Mutual (the WaMu loan), secured by a first deed of trust, and $34,400 from Chase Manhattan (the Chase loan), secured by a second deed of trust.

The following month, March 2000, the parties received a sum of $23,000, which the seller of the subject property had placed in escrow for termite repair work. They placed this sum in a Charles Schwab account (the Schwab account), which at that time already contained $10,270.68. The total funds in the account, some $33,000, were earmarked for renovations to the subject property, but by the time of the parties' separation in September 2000, only some $10,000 had been spent on repair work.

In late November 2000, some three months after the parties' separation, Durand obtained a loan of $100,000 from HomeEq without Latedjou's knowledge or consent, and Durand signed Latedjou's name to the loan documents. Durand used $34,400 of the loan proceeds to pay off the Chase loan, and the HomeEq loan was secured by a second deed of trust.

In June 2001, Durand closed his 401(k) account with a former employer, receiving a gross amount of $36,255.04. He did this without Latedjou's knowledge or consent. Because he made no "rollover" of these proceeds, the employer withheld $10,751 for taxes. Although there was some question as to what Durand did with the remaining $25,504.04, it was clear he failed to give Latedjou her one-half interest in this liquidated asset.

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[1] The facts are drawn from the final statement of decision after trial.

Durand filed a petition seeking bankruptcy relief in February 2003. In early February 2004 HomeEq filed an objection in the bankruptcy proceeding, seeking to enforce a claim of $120,000 against the subject property. Durand, on February 12, 2004, dismissed his bankruptcy petition. The following day Latedjou filed her own petition for bankruptcy relief under Chapter 13.[2] In March 2004 HomeEq reasserted its claim against the subject property, filing an objection in her bankruptcy proceeding. In the following months there were "numerous proceedings" in which Latedjou contested her responsibility for the HomeEq loan, which Durand had obtained without her knowledge or consent. During this period Latedjou told Durand that the bankruptcy court would likely permit HomeEq—whose claim was now $160,000—to foreclose on Durand's one-half interest in the subject property. Durand responded that he could not pay HomeEq's claim, but did not want Latedjou to lose the subject property or be compelled to share it with a third party. On November 19, 2004, Durand executed a quitclaim deed conveying his interest in the subject property to Latedjou.

In February 2005, the bankruptcy court annulled the automatic stay as to HomeEq, permitting it to proceed with a trust deed sale of Durand's one-half interest in the subject property. HomeEq began proceedings for the sale in July 2005. Latedjou, however, began to negotiate a settlement, and in January 2006 she and HomeEq reached an agreement whereby Latedjou agreed to pay $70,000 to discharge HomeEq's claim of $160,000 against Durand's interest in the subject property.

In May 2006, Latedjou refinanced the subject property, obtaining a new secured loan of $370,000. With the proceeds she applied $256,687 to pay off the WaMu loan, applied $70,000 to pay off the HomeEq claim, and completed her Chapter 13 plan by paying an arrearage of $20,737.51.

On November 8 and 9, 2007, the trial court conducted a hearing in the parties' dissolution proceeding to adjudicate a division of the community estate. Latedjou's trial

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[2] See title 11 United States Code section 1301 et seq.

brief identified four disputed issues: (1) whether the quitclaim deed executed by Durand in November 2004—conveying his one-half interest in the subject property to Latedjou—effected a transmutation of the subject property from community property to Latedjou's separate property; (2) whether the student loans obtained by Latedjou during the marriage were a community debt, for which Durand was responsible for one-half; (3) whether Durand was responsible to pay Latedjou an amount equal to one-half of the 401(k) account that he closed in June 2001; and (4) whether Durand was responsible to pay Latedjou one-half of the $23,000 that remained in the Schwab account at the time of the parties' separation in September 2001. Durand raised an additional issue at trial, contending that the date of the parties' separation was not September 2000 but March 2001.

On April 10, 2008, the trial court filed its final statement of decision after trial. The court ruled that the parties had stipulated to a date of separation in September 2000 at a mandatory settlement conference—evidently held in January 2007—and that Durand was precluded from contesting this date under local rule.[3] As to the disputed issues, the court concluded the following: (1) Durand's quitclaim deed, transferring to Latedjou his one-half interest in the subject property, effected a transmutation of that property from community property to Latedjou's separate property; (2) the student loans—with a current balance of $27,000—were not used for educational purposes but for community expenses, and the debt was therefore a community obligation for which Durand was responsible for one-half; (3) Durand was obligated to pay Latedjou one-half of the value of the $36,255.04; and (4) Durand was responsible to pay Latedjou one-half of $23,000, the amount that existed in the Schwab account at the date of separation.

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[3] The local rules governing Family Law proceedings call for a mandatory settlement conference, at which the parties must submit a statement identifying all contested issues as well as those that are stipulated or uncontested. (Super. Ct. S.F. County, Local Rules, rule 11.13(D)(2)(c), (d).) Parties are precluded from raising an issue at trial that was not asserted at the mandatory settlement conference. (Super. Ct. S.F. County, Local Rules, rule 11.13(J).)

Durand's appeal followed.[4] (Code Civ. Proc., § 904.1, subd. (a)(2); Fam. Code, § 210.)

DISCUSSION

A. Date of Separation

Durand argues the trial court erred in finding that September 2000 was the date of separation. He claims there was no evidence presented at trial to establish this fact by a preponderance of evidence. He further notes that the stipulation—made by his former counsel at the mandatory settlement conference—was made "mistakenly" and without his consent. He reasons that the remedial provisions of Code of Civil Procedure section 473 should "overrule" strict application of the local rule in this case.

These objections have no merit. It was not necessary to present evidence at the trial to establish September 2000 as the date of separation, because the issue had been resolved at the mandatory settlement conference held in January 2007. The remedial provisions of Code of Civil Procedure section 473 do not preclude application of the local rule in this instance, because Durand never utilized them. In Durand's view, his former counsel's stipulation "mistakenly" removed the date of separation as a disputed issue to be tried. As such that portion of the mandatory settlement conference statement was in the nature of a "proceeding taken against him . . . through . . . mistake, inadvertence, surprise, or excusable neglect." (Code Civ. Proc., § 473, subd. (b).) It was incumbent upon Durand to apply for relief from the mistake within a reasonable time not to exceed six months after the stipulation was taken. (*Ibid.*) Nothing in the record indicates that Durand made a timely application for relief under the statute. Nor did he seek relief at the time of the trial in November 2007, well over six months after his former counsel's stipulation.

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[4] Generally a trial court's statement of decision is not appealable. Nonetheless a reviewing court has discretion to treat such a statement as an appealable order when, as here, it is signed and filed and evidently constitutes the court's final decision on the merits. (See *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 901.)

B. The Subject Property

1. *The Factual Findings*

Durand raises a number of objections relating to various findings the trial court made in connection with its disposition of the subject property. For example, Durand argues there was no evidence to support some findings "beyond [Latedjou's] statements." Other findings are objectionable in his view because they are contradicted by his own testimony. Essentially, Durand complains that the court abused its discretion because it accepted Latedjou's "unsubstantiated allegations, arguments and speculations" as evidence while disregarding his own evidence to the contrary.

Durand's and Latedjou's versions of events were unquestionably in sharp conflict, and the trial court clearly resolved that conflict in Latedjou's favor. As the trier of fact, it had the exclusive function to weigh the evidence and determine the credibility of witnesses. (*Hinshaw v. Hopkins* (1940) 37 Cal.App.2d 230, 241.) Our task is not to reweigh the evidence or revisit credibility issues. Rather we determine whether there is substantial evidence to support any challenged finding, viewing the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in favor of the ruling. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630.) Notwithstanding Durand's insistence that Latedjou's was not credible because she "lied" about her income and her Chapter 13 plan, we see nothing inherently incredible in Latedjou's declaration in lieu of direct testimony and her testimony on cross- and redirect examination. Nor do we find any clear contradiction between her statements and the documentary evidence.

The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact. (Evid. Code, § 411.) With respect to the findings Durand challenges here, we have reviewed the record and conclude that there is substantial evidence to support each of them, in the form of Latedjou's declarations and testimony.[5]

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[5] The trial court admitted as exhibits Durand's and Latedjou's respective declarations in lieu of direct testimony, and each then took the stand for cross- and redirect examination only. In his

2. *Valuation of the Subject Property*

"For the purpose of division of the community estate . . . the court shall value the assets and liabilities as near as practicable to the time of trial." (Fam. Code, § 2552, subd. (a).) Durand contends the trial court erred in its "evaluation" of the subject property based on its purchase value.

We disagree. Latedjou testified that the subject property had not increased in value between the date of purchase in February 2000 and the date Durand obtained the HomeEq loan in November 2000. The purpose of this particular evaluation was to determine the amount of equity in the subject property, if any, as of the time Durand encumbered it with the HomeEq loan. The purpose of the evaluation was *not* to divide a community asset but to determine, ultimately, whether Durand's quitclaim deed effected a transmutation of his interest to Latedjou's separate property. (See Fam. Code, § 850.) There was no violation of Family Code section 2552.

3. *Presumption of Undue Influence*

Whenever a transaction between spouses advantages one spouse and disadvantages the other, Family Code section 721, subdivision (b), gives rise to a presumption that the transaction is the result of undue influence. The advantaged spouse has the burden to show there was no undue influence. (*In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 996.) Durand contends the trial court erred by failing to consider and apply this presumption in his favor, so as to set aside the quitclaim deed as one obtained through Latedjou's undue influence.

We note that Durand, in his proposed statement of decision, argued in favor of this presumption, reasoning that the quitclaim deed was not supported by consideration. The court, for its part, determined that the presumption did not apply because there was

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appeal Durand elected to prepare an appendix in lieu of a clerk's transcript. We presume the appendix and reporter's transcripts include all matters material to deciding the issues raised. (Cal. Rules of Court, rule 8.163.) Since Durand has not included Latedjou's declaration in lieu of direct testimony, we will assume that her trial brief, which does appear in the appendix, accurately restates the pertinent averments of the omitted declaration.

valuable consideration—specifically, by assuming Durand's one-half interest in the subject property, a one-half interest that was subject to HomeEq's second deed of trust, Latedjou effectively assumed liability for the HomeEq claim of $160,000, although she was subsequently able to reduce that liability to $70,000 through negotiation. It is clear to us that the court did consider the application of the presumption and correctly concluded it did not arise given Latedjou's assumption of the HomeEq loan.

4. *Retirement of the Chase Loan*

Durand urges that the trial court erred by failing to require Latedjou to reimburse Durand for one-half of the approximately $34,000 he paid to retire the Chase loan around the time he obtained the HomeEq loan.

We see no merit in this claim. As Durand conceded at trial, the retirement of the Chase loan was a *requirement* for obtaining the HomeEq loan. As a practical matter, the transaction was not so much the elimination of a community debt as it was a substitution of a $100,000 debt for a $34,000 debt.

C. *The Student Loans*

Durand contends the trial court erred in assigning to him responsibility for one-half of the $27,000 still owed on student loans obtained by Latedjou during the marriage. He reasons there was no evidence "beyond [Latedjou's] testimony" that the student loans were deposited into the parties' joint account, and that the community could not have benefited from the loans because Latedjou did not obtain her degree until after the parties' separation. Durand also objects that, even if the loan proceeds were deposited in their joint account and used for community expenses, the court failed to take into account the fact that Latedjou necessarily paid for her educational expenses from this same account.[6]

Ordinarily an educational loan is assigned as debt of the individual student rather than as a community debt. (Fam. Code, §§ 2627, 2641, subd. (b)(2).) The trial court,

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[6] Latedjou testified that she did not have a personal account during the marriage.

however, has discretion to reduce or modify such an assignment "to the extent circumstances render such a disposition unjust." (Fam. Code, § 2641, subd. (c).) Circumstances that might justify the court's reduction or modification of the assignment of educational loan as debt of the individual student include but are not limited to the fact that "The community has substantially benefited from the education, training, or *loan incurred* for the education or training of the party." (Fam. Code, § 2641, subd. (c)(1), italics added.)

Latedjou's declaration averred that she and Durand did not need financial aid in order for her to attend San Francisco State University. Durand, however, insisted that she apply for any aid she could obtain, as the interest rates were low and they could "put the money away." She averred further, and testified on cross-examination, that all the proceeds of her student loan were placed in the parties' joint bank account, where they were used to pay for community living expenses.

As we have noted above, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact. (Evid. Code, § 411.) Latedjou's testimony was not inherently incredible. While she failed to submit bank statements in support of her testimony regarding the use of her student loan proceeds, this failure goes only to the weight of her testimony. The weight and credibility of a witness's testimony is a matter strictly within the trial court's province. (*Hinshaw v. Hopkins, supra,* 37 Cal.App.2d 230, 241.) (We are satisfied that the trial court acted within its proper discretion when it assigned the student loans to the community rather than to Latedjou, based on Latedjou's testimony showing that the community had benefited substantially from the "loan[s] incurred" for her education. (Fam. Code, § 2641, subd. (c)(1).) We are not persuaded otherwise by Durand's objection that the trial court failed to consider that the community must have used some portion of the loan proceeds, or other community funds, to pay for Latedjou's educational expenses. It does not appear that Durand ever sought to show the amount of Latedjou's educational expenses.

D. ***The 401(k) Account***

Durand complains the trial court failed to "clarify the alleged inconsistency" in his testimony on the disposition of the proceeds from his 401(k) account.[7] He further characterizes his closing of the 401(k) account as a mere transfer of funds from one investment account to another, specifically the Schwab account. In his view his decision to close the 401(k) account and invest the proceeds elsewhere, without rolling them over into another retirement account, amounted to nothing more than negligent conduct that was not sufficiently culpable to justify the court's award to Latedjou of one-half of $36,255.04—the total amount of proceeds from the account. Durand also suggests that the award was improper because the court failed to consider that Latedjou as well as Durand benefited from a tax deduction they took jointly in 2001, a deduction that reflected the loss of the net proceeds from the 401(k) account due to a decline in the value of the stock in which the Schwab account had been invested during the remainder of 2001.

The trial court found that all contributions to the 401(k) account were made during the parties' marriage, that the account was community property at the time the parties separated, and that Durand closed the account months after their separation without Latedjou's knowledge or consent. These findings are supported by Latedjou's declaration and testimony. The court's failure to "clarify" Durand's disposition of the net proceeds is beside the point. The fact remained, as the court observed, that Durand liquidated a community asset after the parties' separation and without Latedjou's knowledge and consent, and thereafter failed to distribute Latedjou's share to her, or otherwise to preserve her one-half interest pending division of the asset by the court. The court concluded that this conduct amounted to a deliberate misappropriation of

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[7] The trial court noted that, after Durand closed the 401(k) account and placed the net proceeds in the Schwab account, he testified that these funds were then lost due to a decline in the value of the stock in which the funds were invested during the remainder of 2001. But Durand also stated that funds from the Schwab account had been used in 2001 to pay for home renovation work and to make payments to Latedjou.

Latedjou's one-half interest in the 401(k) account. Given the trial court's findings, we are not persuaded that Durand's conduct was mere negligent mishandling of a community asset. Rather we are satisfied that the court acted within its discretion when it determined that Durand's conduct amounted to deliberate misappropriation and awarded Latedjou an amount equal to her one-half interest in the asset. (See Fam. Code, § 2602; cf. *In re Marriage of Schultz* (1980) 105 Cal.App.3d 846, 855.) Although Durand received only $25,504.04 of the total 401(k) proceeds, this was the result of Durand's unilateral decision not to roll those funds over into another retirement account, and that decision did not affect his obligation to preserve Latedjou's one-half interest in the total proceeds pending the court's division of the community estate. (See Fam. Code, § 721, subd. (b)(3).) We note finally that Latedjou testified she was unaware Durand had claimed a tax deduction for both of them based on the 2001 losses in the Schwab account. Under such circumstances we see no abuse of discretion in the court's failure to take the tax deduction into account when it made its award to Latedjou.

E. *The Schwab Account*

Durand contends there was no evidence other than Latedjou's testimony, that $23,000 was deposited into the Schwab account in March 2000 and that "any such funds existed in the [] Schwab account at the time of separation."[8]

It is true the trial court evidently relied on statements in Latedjou's declaration, that the parties had received some $23,000 from an escrow account, that they had deposited that sum into the Schwab account in March 2000, when it already contained some $10,000, that they intended the total of $33,000 to be used for renovation and repairs, that only some $10,000 had been spent on repairs by the time they separated in September 2000, and that Durand had never accounted to Latedjou for the remaining sum

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8 Durand also suggests that Latedjou relied on evidence in the form of a cashier check, and claims the check does not show a deposit of $23,000 into the Schwab account, but is rather a check from Latedjou and Durand payable to a title company. While that check is included in Durand's appendix, it is not marked as one of Latedjou's exhibits admitted at trial. Nor does such a check appear in the reporter's list of Latedjou's exhibits, although she did submit a settlement statement from the same title company dated March 14, 2000.

of $23,000. We note there is nothing in the record that renders these averments inherently incredible, and observe once again that the court was entitled to rely on them alone when it made findings to the same effect. (Evid. Code, § 411.)

DISPOSITION

The final statement of decision after trial filed April 10, 2008, is affirmed.

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Graham, J.*

We concur:

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Marchiano, P. J.

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Margulies, J.

* Retired judge of the Superior Court of Marin County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.